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No. 86-1353

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DALE FOLTZ, WARDEN, Petitioner,

v.

WILLIE ARTHUR THIGPEN, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should certiorari be granted to resolve a split of authority in the federal circuits when there is in fact no split of authority and the lower court's decision is consistent with prior decisions of this Court?

2. Should the decision in Stone v. Powell, 428 U.S. 465 (1976), be expanded to preclude habeas corpus relief from the admission of unreliable identification testimony at trial?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Willie Arthur Thigpen, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Sixth Circuit's opinion in this case. That opinion is reported at 804 F.2d 893 (6th Cir. 1986).

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Sixth Circuit's Decision is Consistent with Applicable Supreme Court Authority, and Does Not Create Any Split of Authority in the Federal Circuits

The petitioner contends that, absent improper police conduct, the admission of unreliable identification evidence based on impermissibly suggestive pretrial confrontations cannot violate a defendant's constitutional right to due process. The petitioner finds implied support for his contention in this Court's decision in Colorado v. Connelly, 479 U.S. _____, 93 L. Ed. 2d 473 (1986), and in the decisions of several federal courts of appeals. The petitioner's contention, however, is not supported by the holdings of the cases upon which he relies. Moreover, it flies in the face of nearly twenty years of applicable Supreme Court precedent.

In Simmons v. United States, 390 U.S. 377, 384 (1968), this Court stated that a conviction based on identification testimony following a pretrial identification violates the defendant's constitutional right to due process whenever the pretrial identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Four years later, this Court confirmed that the primary evil to be avoided is the substantial likelihood of irreparable misidentification, and stated that "it is the likelihood of misidentification which violates a defendant's right to due process," not the actions of the police. Neil v. Biggers, 409 U.S. 188, 198 (1972). In Manson v. Brathwaite, 432 U.S. 98, 114 (1977), this Court again confirmed its previous holdings, stating that "reliability is the linchpin in determining the admissibility of identification testimony."

Lower courts have had no difficulty interpreting and applying this Court's holdings with respect to the admissibility of unreliable identification evidence. In Green v. Loggins, 614 F.2d 219 (9th Cir. 1980), for example, the Ninth Circuit affirmed a district court's grant of a writ of habeas corpus because of an impermissibly suggestive pretrial confrontation procedure. The Ninth Circuit recognized that "an in-court identification by a prosecution witness may prove to be unreliable, even though the pre-trial encounter in question has not involved any culpable police conduct." Id. at 222. The court explained that the inadvertence of a pretrial confrontation is often a factor in a court's decision to admit identification evidence, "not because there has been an absence of wrongful police activity, but only because the circumstances surrounding an accidental encounter are often

directly relevant to the question of the reliability of the in-court identification." Id. The court recognized that the lack of suggestiveness of most inadvertent confrontations did not mean that every inadvertent confrontation is automatically beyond constitutional scrutiny. Id. at 223. Noting this Court's explicit instruction that "it is always necessary to 'scrutinize any pretrial confrontation,'" Kirby v. Illinois, 406 U.S. 682, 690 (1972) (emphasis in original) (quoting United States v. Wade, 388 U.S. 218, 227 (1967)), the Ninth Circuit recognized that a court is obligated to review every pretrial confrontation to ensure that the confrontation was not impermissibly suggestive. 614 F.2d at 223.

Federal district courts have reached similar results. In United States v. Ballard, 534 F. Supp. 749, 751 (M.D. Ala. 1982), the district court recognized that whether the confrontation involved improper police conduct was irrelevant. Instead of relying on police conduct, the court held that "due process is violated by the admission of an eye-witness identification made after any unduly suggestive encounter, unless the identification is independently reliable." Id. (citing Green, 614 F.2d at 222-25). Similarly, in Gonzales v. Hammock, 477 F. Supp. 730 (S.D. N.Y. 1979), rev'd on other grounds, 639 F.2d 844 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981), the district court noted that an inadvertent confrontation can induce a witness to identify a suspect even though the police have no intent to suggest. Id. at 735.

None of the cases cited by the petitioner have sought to add to this Court's analysis the proposition that improper police conduct is a prerequisite to impermissible suggestiveness. In United States v. Neverson, 463 F.2d 1224 (D.C. Cir. 1972), the defendant maintained that a witness' identification

was tainted by two pretrial confrontations. The first occurred when the witness inadvertently encountered the defendant on the street shortly before the witness viewed the defendant in a line-up. The second occurred when the police, while arranging the line-up, told the defendant that he could take whatever position in the line-up he wished.

There was conflicting testimony as to whether the second pretrial confrontation ever occurred. The District of Columbia Circuit upheld the trial court's determination that it had not.

With respect to the first pretrial confrontation, the District of Columbia Circuit noted that the witness immediately identified the defendant upon observing him on the street. Id. at 1230. In determining that the identification of the defendant by the witness was reliable, the court noted the witness' opportunity to view the defendant at the time of the crime, the witness' description of the defendant shortly after the crime, and the witness' identification of the defendant's photograph before the pretrial confrontation. Id. at 1225-26. Thus, the court held that the pretrial confrontation was not impermissibly suggestive and that the identification of the defendant was reliable. The court did not attempt to use the inadvertent nature of the pretrial confrontation as an excuse for abandoning the traditional reliability analysis.

Mock v. Rose, 472 F.2d 619 (6th Cir. 1972), cert. denied, 411 U.S. 971 (1973) also does not support the petitioner's contention. In Mock, the Sixth Circuit held only that the inadvertent nature of the pretrial encounter was one of several factors involved in its determination. Id. at 621. For example, the court also relied on the fact that the

witness had immediately identified the defendant upon observing him during the pretrial confrontation. Id.

Similarly, in United States v. Massaro, 544 F.2d 547, 550 (1st Cir. 1976), cert. denied, 429 U.S. 1052 (1977), the First Circuit noted that the pretrial confrontation was inadvertent, but also noted that there was no suggestiveness under the facts. The court stated that the reliability of the identification was supported by the witness' spontaneous and positive identification of the defendant during the pretrial confrontation. Id. at 551.

The decision of the Fourth Circuit in United States v. Colclough, 549 F.2d 937 (4th Cir. 1977), does contain dicta that supports the petitioner's contention. Although the court opined that an inadvertent confrontation would not violate due process, however, the court nevertheless based its holding on a determination that the identification was reliable under the circumstances. The Fourth Circuit noted that the witness' identification of the defendant during the pretrial confrontation was immediate, spontaneous, and positive. Id. at 941. The court also noted that the defendant was standing in a crowd of people at the time of the pretrial confrontation, and that there was nothing about the defendant to attract the witness' attention. Id. Finally, the court observed that there had been no intervening line-up or prior observations of the defendant by the witness. Id. Thus, the Fourth Circuit's holding was based on the reliability of the identification--not the inadvertent nature of the confrontation.

This Court's recent decision in Colorado v. Connelly, 479 U.S. ____, 93 L. Ed. 2d 473 (1986), does not weaken this Court's emphasis on reliability as the determinative factor in evaluating the admissibility of identification evidence based

on impermissibly suggestive pretrial confrontations. Nor does it support the petitioner's argument.

The petitioner seeks support from this Court's holding in Connelly that coercive police conduct is a prerequisite to a finding that a confession is not voluntary so as to deprive the defendant of due process upon its admission into evidence. See 93 L. Ed. 2d at 484. In Connelly, however, this Court noted that the cases in which this Court has considered the admissibility of involuntary confessions have traditionally contained a "crucial element of police overreaching," id. at 482, and that the purpose of excluding involuntary confessions has been to "substantially deter future violations of the Constitution." Id. at 484. Obviously, the exclusion of involuntary confessions would serve no deterrent purpose if they were not the result of improper police conduct. It was this reasoning, and the emphasis on deterrence, that led to this Court's decision in Connelly.

In contrast, this Court's decisions in Simmons, Biggers, and Manson have consistently focused on the reliability of the challenged evidence--not the deterrence of improper police conduct. Unlike confessions, the admissibility of which are determined on the basis of police conduct "without regard to reliability, the admissibility of identification evidence is entirely dependent on reliability." Summitt v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979). In evaluating the reliability of identification evidence, the responsibility for impermissibly suggestive pretrial confrontations is irrelevant. Thus, the rationale employed by this Court in Connelly simply does not apply in the context of suggestive pretrial confrontations.

The Sixth Circuit's decision in this case reflects a proper application of this Court's reliability analysis. A brief review of the facts in this case clearly demonstrates the impermissible suggestiveness of the pretrial confrontations.

Approximately nine hours after the robbery, the police put the respondent, Willie Thigpen, in a five-man line-up. The line-up also included Willie Thigpen's brother, Jeffrey. The witness, Robert Jackson, immediately identified Jeffrey Thigpen as one of the two robbers. Despite a prolonged opportunity to view Willie Thigpen in the line-up from a distance as close as three or four feet, Jackson failed to identify Willie Thigpen as one of the robbers. Over the next two months, Jackson saw Willie and Jeffrey Thigpen together at criminal hearings at which Jeffrey was prosecuted for the robbery. He saw them come to court together. He saw them sit together before Jeffrey's trial. Jackson later testified that, each time he saw Willie Thigpen at the criminal hearings, he remembered having seen Willie Thigpen at the line-up.

Although Willie Thigpen was not a defendant at Jeffrey's criminal hearings, Jackson nevertheless saw Willie Thigpen with Jeffrey in the context of a prosecution based on the robbery. Jackson knew that Willie and Jeffrey Thigpen were together, but he did not know that the reason they were together was because they were brothers. Instead, Jackson knew that Jeffrey Thigpen was one of the robbers and that Willie Thigpen was one of four other men presented in the line-up as potential suspects. Thus, during a series of criminal proceedings related to the robbery, Jackson saw a man he knew to be a suspect in the robbery together with a man he

knew to be one of the robbers. The extreme and impermissible suggestiveness of the pretrial confrontations is undeniable.

Having recognized the impermissible suggestiveness of the pretrial confrontations, the Sixth Circuit properly turned to a determination of the reliability of the identification. The Sixth Circuit evaluated the reliability of the identification evidence under the five-factor test established by this Court in Neil v. Biggers, 409 U.S. 188, 199-200 (1972). The court properly concluded that none of the five factors supported the reliability of Jackson's identification of Willie Thigpen. 804 F.2d at 897. Accordingly, the court granted habeas corpus relief.

II. The Reasoning of this Court in Stone v. Powell Does Not Apply to the Admission of Unreliable Identification Evidence

The petitioner's reliance on Stone v. Powell, 428 U.S. 465 (1976), is misplaced. The petitioner contends that the exclusion of identification evidence based on impermissibly suggestive pretrial confrontations "is designed, in substantial part, to deter the police from conducting suggestive identification procedures." Petition at 21. In view of the substantial body of case law from this Court, the federal courts of appeals, and the federal district courts, however, the petitioner's contention is absurd.

This Court has consistently repudiated the notion that the deterrence of police misconduct has any part in evaluating the admissibility of identification evidence based on impermissibly suggestive pretrial confrontations. See Manson v. Brathwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 198 (1972); Kirby v. Illinois, 406 U.S. 682, 690 (1972). Accord Green v. Loggins, 614 F.2d 219, 222 (9th Cir. 1980); Summitt v. Bordenkircher, 608 F.2d 247, 251 (6th Cir. 1979);

United States v. Ballard, 534 F. Supp. 749 (M.D. Ala. 1982); Gonzalez v. Hammock, 477 F. Supp. 730 (S.D.N.Y. 1979), rev'd on other grounds, 639 F.2d 844 (2d Cir. 1980), cert. denied, 449 U.S. 1088 (1981).

As in Connelly, the emphasis in Stone v. Powell is not on reliability, but on the deterrence of improper police conduct. This Court held that there would be no deterrent purpose in granting federal habeas corpus relief to a state prisoner when the state had provided an opportunity for full and fair litigation of a Fourth Amendment claim. Indeed, Chief Justice Burger emphasized the distinction in his concurring opinion by noting that Stone v. Powell did not involve an attempted exclusion of evidence on the basis of any lack of reliability. 428 U.S. at 496-97.

Even if this Court's decision in Stone v. Powell were extended to this case, habeas corpus relief would not be precluded because Willie Thigpen did not receive a full and fair litigation of his claim in the Michigan state courts. Prior to the decision of the Sixth Circuit, none of the lower courts had evaluated Willie Thigpen's claim under the analytical test mandated by this Court in Simmons, Biggers, and Manson. Thus, even under an extension of Stone v. Powell, Willie Thigpen would be entitled to habeas corpus relief.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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